Supreme Court, U.S.
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No. 86-1350

IN THE

Supreme Court of the United States

October Term, 1986

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423 SOUTH SALINA STREET, INC.,
Appellant,

against

CITY OF SYRACUSE, METROPOLITAN DEVELOPMENT FOUNDATION OF CENTRAL NEW YORK, INC., and AMLEA (NEW YORK), INC.,
Appellees.

MOTION TO DISMISS

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Questions Presented.

Does 42 U.S.C. §1988 subject civil rights money damage claims to a New York statute requiring a notice of tort claim prior to suit?

Does an intentional tort statute of limitations govern §1983 actions in light of *Wilson v. Garcia,* 271 U.S. 261 or, as the Court below held, a statute of limitations for negligence actions?

Does appellant state a "taking" claim under 42 U.S.C. §1983 because the City acquired its property for admitted tax delinquency?

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Motion to Dismiss or Affirm.

The Appellee City of Syracuse moves the Court pursuant to Rule 16 to dismiss the appeal herein, or in the alternative to affirm, on the following grounds:

I. The appeal is not within this Court's jurisdiction. No appeal lies to the Court under 28 U.S.C. §1257(2) because in this case there is not drawn into question the validity of a state statute on the ground of it being repugnant to the Constitution or laws of the United States.

II. A Constitutional question was not raised in the state courts below.

III. It is not necessary to reach the federal question.

IV. The appeal does not present a substantial federal question.

V. The appeal was not taken in conformity with the Court's rules.

VI. Certiorari should be denied.

The argument which follows deals with these grounds in more detail and in the order shown above. In the event the appeal is dismissed, appellee requests that certiorari be denied for the reasons set forth herein.

Statement of the Case.

a) Facts regarding the merits.

The relevant facts are undisputed and briefly stated. The appellant, 423 South Salina Street, Inc., was incorporated in New York State on September 15, 1976. Eleven days later on September 26, 1976, it acquired premises commonly known as 425-27 South Salina Street, Syracuse, New York ("the Property") (5d ¶7).* Appellant acquired the Property for $25,000 subject to the first two quarters of unpaid 1976 real estate taxes.

Appellant never paid the 1976 taxes on the Property or the 1977, 1978 or 1979 taxes. On April 9, 1979, a tax deed to the Property was issued to appellee, the City of Syracuse, New York, by reason of appellant's failure to pay the 1976 taxes. It should be noted that appellant was a corporation which was dissolved in 1980 for failure to pay state franchise taxes (4d ¶2).

The appellant has characterized its "taking" claim as resting on the City's repeated overtaxing of the Property so "as to completely destroy the value of the Property" and the fact that the City acquired the Property by reason of Appellant's admitted tax delinquency (Jurisdictional Statement, p. 9).

With respect to appellant's "destruction of value" claim, appellant conceded below that the Property's value was *already* destroyed when it bought the Property because of acts which pre-dated its acquisition and corporate existence. In its brief to the New York Court of Appeals, the appellant claimed that the City's alleged policy of overtaxing directed to its predecessor in title (the Univer-

*Page numbers in parentheses refer to pages of appellee's appendix unless otherwise stated.

sity of Rochester) "destroyed the value of the Property and explains the University of Rochester's willingness to dispose of its interest therein * * * for $25,000" (p. 15, Appellant's Brief to N.Y. Court of Appeals). Thus, in 1976, appellant purchased for $25,000 property whose 1976 value was judicially fixed by the New York Courts at $950,000. *W. T. Grant v. Srogi,* 52 NY2d 496, 509 n.1.

According to appellant, the Property's value was *already* destroyed when appellant purchased it from the former owner, the University of Rochester. This concession in appellant's brief is significant for two reasons: First, it shows that appellant did not purchase property which *later* lost its value, but rather purchased property which had *already* lost its value. Secondly, it shows that appellant is really seeking to sue for alleged wrongs suffered by appellant's predecessors (W. T. Grant and the University of Rochester) and not for alleged wrongs done to appellant.

Appellant was willing to purchase property already depreciated in value because appellant was incorporated to speculate in real property. The New York Court of Appeals and the United States District Court for the Northern District of New York have stated the following with respect to this appellant:

> [The appellant] acquired the Grant property in late 1976 with full awareness of its tax history. Indeed [the appellant] purchased the property at the low price of $25,000.00 with the understanding that it would assume all tax liability then owing. These taxes were never paid nor did [the appellant] pay taxes on the property for the next three years. *W. T. Grant v. Srogi,* 52 NY2d 496, 518 (1981).

> [Appellant] paid $25,000.00 for the Property in the hopes of receiving a favorable decision on the claim of overassessment. If such a decision was rendered, and, of course, upheld on appeal, then appellant would have paid the assessment. In this manner, appellant's speculation would have resulted in acquisition of the property at a "bargain price".
>
> *423 S. Salina St. v. City of Syracuse,* 566 F.Supp 484, 487 n3 (Jurisdictional Statement P. A-35 n.3).

The Federal District Court termed appellant's acquisition a "speculation" that could have resulted in acquiring the Property for a "bargain price" for good reason. As previously noted, New York Courts fixed the Property's value at $950,000.00 for the 1976 tax year and appellant only paid "the low price of $25,000.00" for the Property subject to 1976 taxes. *W. T. Grant v. Srogi,* 52 NY2d 496, 509 n.1 (1981).

Appellant's deliberate and intentional refusal to pay the 1976 taxes or taxes for any other years was a calculated strategy to fix its maximum loss at the $25,000.00 purchase price. In fact Appellant refused to pay the 1976 taxes as reduced, from $128,504 to $42,997, by the Appellate Division of New York's Supreme Court. As the District Court noted above, by gambling on the outcome of the pending assessment review proceedings and by not paying taxes (either as originally assessed or reduced by courts), appellant sought to pyramid the value of its investment without risking any more than its initial stake—i.e., its $25,000.00 purchase price. Appellant was aware that the risk in such a strategy was that the City would acquire the property for the 1976 tax delinquency. This the City did by the tax deed filed April 9, 1979.

Appellant engaged in real estate speculation and lost. Appellant now attempts to litigate its way to a profit. Appellant's theory seems to be that it can gamble and take risks with tax delinquent property, but if the outcome is not favorable, resort can be made to the federal civil rights statutes.

Appellant has abandoned any interest in reclaiming the Property for to do so would require it to pay the taxes it owes. Appellant does not challenge the finding and holding of the Court below that appellant "does not * * * having standing to obtain equitable relief in the form of vacatur of the tax deed taken by the City * * * [appellant] has offered no explanation for its failure to pay the taxes found due * * * Moreover, [appellant] has made no offer in this proceeding to pay taxes due * * *" (Jurisdictional Statement, p. A-6).

By reason of the foregoing facts, this case presents a corporation, dissolved six years ago for failure to pay state franchise taxes, which purchased tax delinquent property valued by Courts at $950,000 for $25,000; which did not, and does not, intend to pay any taxes due; which does not now seek return of the property by setting aside the tax deed vesting title in the appellee, City of Syracuse; but which, nonetheless, wishes to use the Civil Rights Act to seek requested damages of $12 million for a $25,000 investment allegedly lost (24d).

The facts have been set forth in some detail because appellee respectfully submits that if the case is set for argument the notice of claim issue sought to be reviewed by appellant need not be reached since there is a failure to state a claim and because the complaint is barred by the Statute of Limitations (Point III herein, p. 10).

b) Facts regarding notice of claim.

The facts particularly relevant to the notice of claim issue reveal that appellant was always represented by counsel and had ample opportunity to comply with New York's notice of claim requirements. The City acquired appellant's Property by filling a tax deed pursuant to state law on April 9, 1979. Within 24 days however, appellant, represented by counsel, applied to state courts for a preliminary injunction restraining the City from transferring its interest in the Property (12d ¶28). Appellant was aware that the tax deed was filed and was represented by counsel but chose not to file a notice of claim for damages.

As the Court below noted, appellant had three years from the April 9, 1979 tax deed filing to seek permission to file its notice of claim, even if it failed to file the notice of claim within the initial 90 day period (Jurisdictional Statement, p. A-18-19). That three year period expired on April 9, 1982. On April 2, 1982, appellant's counsel filed a federal civil rights action in federal district court. Again, no notice of claim was filed or application made to serve a late notice of claim. Moreover, a year earlier—on April 2, 1981—the New York Court of Appeals finally dissolved the previously issued preliminary injunction restraining the City from transferring its interest in the Property acquired by the tax deed (13d ¶32). Thus, appellant and his counsel had adequate opportunity and knowledge of the facts but chose not to file a notice of claim.

Appellant was always represented by counsel and was aware of the alleged adverse actions being taken against it, and yet failed to file a notice of claim. Appellant was not reticent about filing civil rights complaints or applications for equitable relief. As the Court below aptly noted "the present plaintiff slept on both the right to give the re-

quired warning of impending suit to the municipality and the right to obtain leave of court, at any time during the full three year limitation period, to give notice late" (Jurisdictional Statement A-19).

POINT I.

The appeal is not within the Court's jurisdiction.

Appellant purports to invoke the Court's jurisdiction pursuant to 28 U.S.C. §1257(2) because the New York Court of Appeals allegedly upheld the constitutionality of §50-i of the New York General Municipal Law.

The New York Court of Appeals did not hold §50-i of the New York General Municipal Law constitutional or even address the issue of that statute's constitutionality. Rather the Court below analyzed the question of whether the notice of claim requirements of that statute should be applied to a §1983 action, as a question "involving * * * [the] construction of 42 U.S.C. §1988" (Jurisdictional Statement, p. 13, C[1]). Thus, the issue was one of statutory construction not constitutionality. The Court below relied on this Court's precedent dealing with the issue of whether a state procedural rule is to be borrowed pursuant to 42 U.S.C. §1988 and determined that §1988 required the application of the notice of tort claim requirements of §50-i of the New York General Municipal Law to civil rights damage actions.

As shown in Point II herein, p. 8, appellant itself urged the Court below to rule that 42 U.S.C. §1988 prohibited borrowing the state statute. Appellant below did not challenge the state statute itself as unconstitutional either facially or as applied. In fact, appellant concedes as much in its Jurisdictional Statement where it attacks the holding below is violating "the first principle of 42 U.S.C. §1988

* * * Section 1988 would not permit borrowing [§50-i of the New York General Municipal Law]" (p. 16).

Accordingly, since the constitutionality of a state statute was not addressed by the court below or raised by appellant, the Court does not have jurisdiction over the appeal. *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969).

POINT II.

The appellant did not raise a constitutional question below.

Appellant never contended below that the notice of claim provisions of New York General Municipal Law §50-i were unconstitutional. Rather, appellant claimed that the question was a federal one to be governed by an interpretation of 42 U.S.C. §1988. Appellant argued below that either the notice of claim provisions were inappropriate to be borrowed pursuant to 42 U.S.C. §1988 or that the language of the state statute did not reach its claim. Appellee argued otherwise. The Court below did not hold §50-i constitutional against a constitutional attack because appellant never claimed that New York General Municipal Law §50-i was unconstitutional.

A review of appellant's submissions to all three state courts below shows appellant relied on an interpretation of 42 U.S.C. §1988, or a narrow reading of §50-i of New York General Municipal Law, and not on a constitutional attack.

Appellant's response to the initial motion to dismiss made to the New York State Supreme Court (Special Term) was that its claim was for an "injury to property" and thus not covered by §50-i of New York General Municipal Law. In appellant's view that statute only applied

to claims for "damage to property" (2a). Appellant also argued that the statute was not intended to apply to civil rights claims (3a). Alternatively, appellant argued that the prior decision of the New York Court of Appeals in *Mills v. County of Monroe,* 59 NY2d 307, cert. denied 484 U.S. 1018, which applied notice of claim statutes to civil rights claims, was distinguishable (2a).

On appeal to the Appellate Division of New York Supreme Court, appellant again tried to distinguish *Mills, supra* (3b), and also relied on federal cases which refused to interpret 42 U.S.C. §1988 as rendering applicable state notice of claim statutes (2b). Specific reliance was placed on the Court's decision in *Burnett v. Grattan,* 468 U.S. 42 (1984), as setting forth the manner in which 42 U.S.C. §1988 should be used to borrow state procedural rules (2b). Appellant's arguments to the New York Court of Appeals were identical to arguments made to the Appellate Division (2c-5c). In fact, appellant's brief to the New York Court of Appeals made no mention of the notice of claim issue at all. Only in a reply brief did appellant discuss 42 U.S.C. §1988 and its effect on borrowing the notice of claim statute.

Thus, appellant below did not attack the constitutionality of §50-i of the New York General Municipal Law.

A most telling admission that the unconstitutionality of the state statute was not attacked was appellant's failure to comply with New York Executive Law §71. That law requires a state court litigant who challenges the constitutionality of a state statute to apply to court to notify the State Attorney General to permit him to intervene and defend the constitutionality of the state statute. Appellant never applied for an order notifying the State Attorney General because appellant never thought of attacking the

constitutionality of New York General Municipal Law §50-i—until now.

By not attacking the constitutionality of the state statute, appellant has not "drawn into question" the validity of §50-i of New York General Municipal Law as required by 28 U.S.C. §1257(2). Thus, no appeal lies. *Garrity v. New Jersey,* 385 U.S. 493, 1495-6 (1967).

POINT III.

It is not necessary to reach the federal question.

Rule 16.1(d) permits appellee to urge any ground as a reason why the Court should dismiss the appeal and not set the case for argument.

The issue appellant seeks to be reviewed—i.e. whether 42 U.S.C. §1988 renders applicable a state statute requiring a notice of tort claim prior to a §1983 suit—need not be reached if the underlying §1983 action fails to state a claim or is time-barred. Such is the case here. Accordingly, if the case were set down for argument, the notice of claim issue need not be reached if affirmance would lie on these other grounds. Appellee may support the judgment appealed from by urging these defenses even though such were rejected by the Court below. *Hankerson v. N. Carolina,* 432 U.S. 233, 240 n.6 (1977); *Massachusetts Mut. Ins. Co. v. Ludwig,* 426 U.S. 479, 480-1 (1976).

Thus, if the case were set for argument the Court would need to decide what state statute of limitations should govern §1983 claims in New York and whether a §1983 claim is properly pleaded.

The complaint in this action contains two counts—Count I dealt with the alleged "destruction of value" of

appellant's property through excessive taxation, and Count II claimed a "taking" occurred because the City acquired the property for admitted tax delinquency (23d). For reasons that follow, Count I and Count II fail to state a claim and are time-barred.

a) The complaint is time-barred.

Appellee urged below, and would press vigorously in this Court, that the proper statute of limitations applicable to this claim is the one year and 90 day period of N.Y. General Municipal Law §50-i(1)c which governs both intentional and unintentional torts. Section 50-i covers "negligence and wrongful acts" and applies to any action for "personal injury", a term defined by New York law to include intentional as well as unintentional torts. New York General Construction Law §37-a. *Collins v. City of N.Y.*, 55 NY2d 646 (1982). *Drake v. City of Rochester,* 96 Misc. 2d 86, 92 (1978).

The Court's decision in *Wilson vs. Garcia,* 471 US 261 (1985) established the analytical framework to select the state statute of limitations governing a §1983 action. Since *Wilson,* where a state has both an intentional tort statute of limitations and a separate statute of limitations for unintentional torts, the Circuit Courts of Appeals have unanimously selected the intentional tort statute of limitations. *Mulligan v. Hazard,* 777 F.2d 340 (CA6, 1985) cert. denied 106 S. Ct. 2901, rehearing denied 107 S. Ct. 12 (1986); *Gates v. Spinks,* 771 F.2d 916 (CA5, 1985) cert. denied 106 S.Ct. 1378 (1986); *Jones v. Peruit and Mauldin,* 763 F.2d 1250 (CA11, 1985) cert. denied 106 S. Ct. 893 (1986). This Court has declined to review any of those decisions.

Contrary to this unanimous precedent, the Court below rejected an intentional tort statute of limitations and se-

lected a statute governing only unintentional torts (i.e., a negligence statute of limitations). *Bleilder v. Bodnan,* 65 NY2d 65, 66 (1985); *Graboi v. Kibel,* 432 F. Supp. 572 (SDNY, 1977). The statute selected, N.Y. CPLR §215(5), expressly excludes actions for intentional torts. Selecting a negligence statute of limitations is inconsistent with the approach of *Wilson, supra,* for the reasons discussed by the Circuit Courts of Appeals in *Mulligan, supra; Gates, supra,* and *Jones, supra.* Moreover, to select a negligence statute of limitations for §1983 actions is clearly erroneous since §1983 actions may not be based on negligent conduct. *Daniels v. Williams,* 106 S.Ct. 662 (1986).

Thus, the proper statute of limitations for §1983 actions in New York is not the 3 year negligence statute selected by the Court below but the one year and 90 day intentional tort statute of limitations of N.Y. General Municipal Law §50-i(1)c. Both Counts I and II of the complaint are time-barred under a one year and 90 day limitation period. The last act complained of occurred on April 9, 1979 (when the tax deed was filed) and the action was not commenced until almost three years later on April 2, 1982 (21d ¶58).

Even with the benefit of a three year statute of limitations, Count I of the complaint is still time-barred. Count I alleges that the City's purported overtaxation which occurred *prior* to the issuance of the tax deed in April 1979, allegedly destroyed the value of the property (23d). But, after appellant acquired the property in September 1976, the only acts taken by the City with respect to the property were as follows:

> (1) On July 1, 1977 the 1978 tax assessment was fixed.
>
> (2) On July 1, 1978 the 1979 tax assessment was fixed (July 1 is the taxable status date for the City. Charter §5-401[5]).

Thus, Count I's allegations properly encompass only these two City actions which occurred after appellant acquired the Property. Count I specifically excludes the April 9, 1979 taking of a tax deed as an element of Count I (23d ¶72). The April 1979 taking of a tax deed is the sole subject of Count II (24d ¶74A).

This action was not commenced within three years of either July 1, 1977 or July 1, 1978 and thus Count I is not timely under a three year statute of limitations. Appellant cannot point to any act which occurred within three years of April 2, 1982 (the date this action was deemed commenced) except the April 9, 1979 taking of the tax deed which is not the subject of Count I. Count I is thus time-barred even under a three year statute of limitations.

b) Count II fails to state a claim.

Count II challenges the City's acquisition of appellant's admitted tax delinquent property. Count II fails to state a claim because prior decisions of the Court have consistently held that nothing in the Constitution prevents the acquisition of tax delinquent property. *Nelson v. City of New York,* 352 U.S. 108 (1956); *Balthazar v. Mari Ltd.,* 301 F.Supp. 103, aff'd. 396 U.S. 114 (1969); *City of Auburn v. Mandarelli,* 320 A.2d 22 (Sup.Ct. Maine, 1974), appeal dismissed 419 U.S. 810 (1974).

In *Balthazar,* as here, a claim was made that the acquisition of tax delinquent property by a municipality constituted a "taking". The Court rejected the claim, stating: "Relying on Supreme Court condemnation cases, plaintiffs also maintain that they were deprived of 'just compensation' for their property * * *. These cases are inapplicable. Rather than taking private property for a public purpose, Illinois is here collecting taxes which are admittedly overdue." 301 F. Supp. 103, 105 n6, aff'd 396 U.S. 114.

The same result was reached in *Nelson v. City of New York*, 352 U.S. 103 (1956). There the City acquired two parcels for admitted tax delinquency. The City retained title to one parcel and sold the other parcel and kept the sale proceeds which exceeded the tax delinquency. The petitioners claimed that they were deprived of their property without due process of law and that their property was "taken" without just compensation. 352 U.S. at 109. The Court rejected such claims: "We hold that nothing in the Federal Constitution prevents this where the record shows adequate steps were taken to notify the owners of the charges due and the [tax] foreclosure proceedings". 352 U.S. at 110.

Appellant makes no claim that adequate steps to notify it were lacking, but simply claims that the tax deed itself and the alleged financial benefit the City enjoyed in acquiring the property constituted a "taking" (24d ¶74). Under the above cited authority, a "taking" does not occur in such circumstances. Count II, therefore, fails to state a claim.

Appellant's claim is not helped by general allegations that the tax deed was based on excessive taxes. As demonstrated in Subsection c of this Point, the Court in *City of Pittsburgh v. Alco Parking*, 417 U.S. 369 (1973) rejected the idea that excessive taxes can effect a "taking". In any event appellant refused to pay the 1976 taxes upon which the tax deed was based even after the New York courts reduced the 1976 taxes to $42,997 from $128,504 (Jurisdictional Statement p. A-6).

c) Count I fails to state a claim

Count I does not allege facts sufficient to state a claim that the Appellant's Property was "taken" in violation of its constitutional rights. Count I of the complaint alleges

that until the City took a tax deed to the Property on April 9, 1979, the City's purported overtaxation "virtually destroyed the value of the Property" so as to constitute a "taking" of plaintiff's Property (23d ¶72).

As previously noted in the Statement of the Case herein, close anlaysis reveals that the alleged pattern of overtaxation complained of largely predated appellant's acquisition of the Property. And as noted, appellant conceded below that the property's value was allegedly destroyed *prior* to its purchase (p. 2-3 herein).

Accordingly, appellant is precluded from relying on City practices and acts which predated its acquisition of the Property to support its claim. Appellant cannot assert or sue for the alleged violation of its predecessor's constitutional rights. *O'Malley v. Brierle,* 477 F2d 785, 789 (3rd Cir. 1973).

Appellant may properly rely only on the two City acts which occurred after its September 1976 purchase to support Count I: (1) the fixing of the 1978 tax assessment on July 1, 1977; and (2) the fixing of the 1979 tax assessment on July 1, 1978.

So construed, the gravamen of Count I is that the City overtaxed the Property for the 1978 and 1979 tax years to such a degree so as to effect a "taking" in violation of plaintiff's constitutional rights.

The Court "has * * * consistently rejected claims that the Due Process Clause of the Fourteenth Amendment stands as a barrier against taxes that are 'unreasonable' or 'unduly burdensome' ". *Commonwealth Edison v. Montana,* 453 U.S. 609, 622 (1981).

"The claim that a particular tax is so unreasonably high and unduly burdensome as to deny due process is both familiar and recurring, but the Court has consistently refused either to undertake the task of passing on the 'reasonableness' of a tax that otherwise is within the power * * * of state legislative authorities, or to hold that a tax is unconstitutional because it renders a business unprofitable". *City of Pittsburg v. Alco Parking,* 417 U.S. 369, 373. In *Alco Parking,* the Court rejected the argument that a revenue raising tax, if sufficiently burdensome, could be invalidated as a "taking" of property and rejected the idea that a court could hold a tax to effect a "taking" of property "from the fact, alone, that the tax appears excessive". 417 U.S. at 376.

In essense, County I alleges that a revenue raising tax was "excessive". Under the above authority "excessive" taxes do not effect a constitutional "taking". Therefore, even assuming the truth of the allegation that high taxes caused the value of the Property to be destroyed, Count I fails to state a claim for a "taking".

POINT IV.

No substantial federal question is presented.

No substantial federal question is presented because this Court's prior decisions support, and almost compel, the result reached below that 42 U.S.C. §1988 requires New York's notice of claim rules to be borrowed. *Robertson v. Wegmann,* 436 U.S. 584 (1978); *Board of Regents v. Tomanio,* 446 U.S. 478 (1980); *Chardon v. Fumero Soto,* 462 U.S. 650 (1983).

In 42 U.S.C. §1988, Congress itself commanded that where no federal rule exists, state law should govern §1983

actions absent inconsistency with federal law. *Robertson v. Wegmann,* 436 U.S. 584, 588-90; *Board of Regents v. Tomanio,* 446 U.S. 478, 484. Section 1988's reference to state law is not facially limited to statute of limitations but includes any state law. In fact, in *Robertson, supra,* the Court applied state laws governing the effect of the death of a §1983 plaintiff to determine whether the action would terminate. State rules governing "tolling, revival and questions of application" are also required to be borrowed under §1988. *Johnson v. Railway Express,* 421 U.S. 454, 464 (1975). Accordingly, Appellant's suggestion that notice of claim rules should not be borrowed because they are not "fundamental" to the judicial system is contrary to the command of §1988 (Jurisdictional Statement p.16).

Thus, the issue is whether New York's notice of claim rule is inconsistent with federal law so as to preclude its borrowing pursuant to 42 U.S.C. §1988. "Section 1988 authorizes federal courts to disregard an otherwise applicable state rule of law only if the state law is 'inconsistent with the Constitution and laws of the United States' ". *Board of Regents v. Tomanio,* 446 U.S. 478, 485 (1980).

Appellant has claimed "inconsistency" exists because *Burnett v. Grattan,* 468 U.S. 42 (1984) purportedly requires the practicalities of federal civil rights litigation to be considered in determining whether a state law is inconsistent with federal law. Appellant misreads *Burnett.* The Court expressly stated that it was not deciding the issue if an inconsistency with state law existed. "The step three inquiry—whether a state rule of decision is inconsistent with the Constitution or federal law—is not necessary to resolve this case * * *". 468 U.S. 42, 53 n.15. The practicalities of federal civil rights litigation are not relevant to the "inconsistency" issue because there is not "anything

peculiar to a federal civil rights claim that would justify reluctance in applying state law. Indeed the express terms of 42 U.S.C. §1988 suggest that the contrary is true". *Johnson v. Railway Express,* 421 U.S. 454, 464 (1975).

The correct approach to "inconsistency" was established in *Board of Regents v. Tomanio,* 446 U.S. 478, 487. "In order to gauge consistency * * * the state and federal policies which the respective legislatures sought to foster must be identified and compared".

The underlying policy behind §1983 is to secure compensation for, and to deter, violations of federal rights. *Robertson v. Wegmann,* 436 U.S. 584, 590-1 (1978). As the Court has stated, if §1983 plaintiffs can enforce their claims simply by complying with state law, then neither compensation nor deterrence is adversely affected. *Board of Regents v. Tomanio,* 446 U.S. 478, 488 (1980).

Thus, the reasoning of *Board of Regents* compels the conclusion that §1983's policies are not offended by borrowing New York's notice of claim rule. As the Court below noted " 'Neither of [§1983's] policies is significantly affected by the notice of claim requirement, since plaintiffs can readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by filing a timely notice of claim' " [Jurisdictional Statement p. A-15, quoting *Cardo v. Lakeland Cent. Sch. Dist.,* 592 F. Supp. 765, 773 (SDNY, 1984)].

That §1983's policy of deterrence is not effected by borrowing New York's notice of claim rule is settled by the reasoning in *Robertson v. Wegmann,* 436 U.S. 584 (1978). There the Court noted that: "A state official contemplating illegal activity must always be prepared to face the prospect of a §1983 action being filed against him. In light

of this prospect, even an official aware of the intricacies of [state] law would hardly be influenced in his behavior by its provisions." 436 U.S. at 592. The Court below correctly applied this reasoning and held that §1983's goal of deterrence is not effected at all "because a municipal officer can never know in advance whether an injured party will timely file a notice of claim or be granted leave to file a late notice of claim". Jurisdictional Statement p. A-16.

Thus, there is no inconsistency with federal law or with §1983 in particular in applying New York's notice of claim rules. The reasoning and analysis employed by the Court in *Robertson v. Wegmann,* 436 U.S. 584 (1978), and *Board of Regents v. Tomanio,* 446 U.S. 478 (1980), fully support, if not compel, this conclusion. Accordingly, no substantial federal question is presented.

The policies underlying New York's notice of claim rule have also been held consistent with federal law and §1983 in particular.

The Court below noted that the notice of claim requirements of New York law "serve important state interests in that [a] governmental subdivision is allowed a meaningful opportunity to investigate the claim in a timely manner and thus protect itself against fraudulent claims" (Jurisdictional Statement, p. A-14).

The Court has also recognized these policies as important because a court's fact-finding function will "obviously be more reliable if the witnesses or testimony in question is relatively fresh. Thus, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely * * * to impair the accuracy of the fact-finding process * * *". *Board of Regents v. Tomanio,* 446 U.S. 478, 487. Thus the policy of preserving evidence

while fresh which underlies New York's notice of claim rule is consistent with federal law.

Moreover, the Court below also found that another purpose of notice of claim provisions was the "not inconsiderable benefit in reducing the burden on courts, both state and federal, when the notice results in negotiation and settlement of claims rather than litigation". Jurisdictional Statement p. A-16. Appellant does not, and could not, dispute that such a purpose is a federally favored policy.

This Court has twice denied certiorari to review the issue of whether 42 U.S.C. §1988 requires state notice of claim rules to be borrowed. Notably, the decision appealed from was not the first time that the New York Court of Appeals applied state notice of claim statutes to federal civil rights actions. In *Mills v. County of Monroe,* 59 NY2d 307 (1983), that Court applied state notice of claim rules to a federal civil rights claim and the Court denied certiorari. 484 U.S. 1018 (1983). More recently in *Clark v. Indiana,* 478 NE2d 699 cert. den. 106 S. Ct. 2893 (1986), the Court refused to review the exact issue presented here.

Lastly, even courts which have refused to borrow state notice of claim rules have been careful to expressly distinguish the effect of New York's notice of claim rules from the statutes before them. *Brown v. U.S.,* 742 F2d 1498 (CADC, 1984, en banc) cert. den. 471 U.S. 1073 (1985); *Fuchilla v. Layman,* 210 N.J. Super. 574, 510 A.2d 281 (1986). The *Brown, supra,* majority distinguished New York's notice of claim rules because of "the unusual flexibility of the relevant New York provision; it was subject to waiver by the court if to waive would promote equity or the action would vindicate the public interest". 742 F2d 1498, 1509 N.6. Accordingly, other court decisions on this

issue are not determinative of whether New York's notice of claim rules are consistent with federal law.

POINT V.

The appeal was not taken in conformity with this Court's Rules.

The Appellant has failed to comply with the Court's Rules in the following respects:

> a) A copy of the notice of appeal was not filed with the court possessed of the record [the Supreme Court, Onondaga County] as required by Rule 10.3
>
> b) Appellant has failed to comply with Rule 28.4(c) in that: (1) the jurisdictional statement fails to recite that 28 U.S.C. §2403(b) may be applicable (under Appellant's view of this matter); and (2) no jurisdictional statement was served on the Attorney General of New York.

POINT VI.

Certiorari should be denied.

If the appeal is dismissed, certiorari should be denied for the reasons already set forth herein and for the additional reasons discussed in this Point.

The alleged conflict of the decision at bar with those of other states presents no federal question. In enacting §1988 Congress decreed that differences among the states would exist by borrowing state law. "Congress * * * sees

no need for national uniformity in all aspects of civil rights litigation". *Burnett v. Grattan,* 468 U.S. 42, 52 n.14 (1984).

And appellant's claim of a perceived conflict with federal courts in New York does not withstand scrutiny. As appellant concedes the District Courts in New York are split on the issue. But the Circuit Court of Appeals has yet to address the issue. Appellant's reliance on *Brandon v. Bd. of Education,* 635 F2d 971 (CA 2, 1980) cert. den. 454 U.S. 1123 (1981) as evidencing a conflict is misplaced (Jurisdictional Statement p. 11). The Court below applied the notice of claim rule only to money damage actions, not equitable relief, in accordance with settled New York law. *Fontana v. Town,* 13 NY2d 1134 (1964); *Fracolla v. City of Utica,* 77 AD2d 161, 165 (1980). However, the plaintiffs in *Brandon* moved for summary judgment only on their equitable claims for declaratory and injunctive relief. 487 F. Supp. 1219, 1223. Accordingly, New York's notice of claim rules did not by their terms apply to the *Brandon* plaintiffs. In fact the Court of Appeals noted that the notice of claim defense was raised to bar a "non-tort claim". 635 F2d 971, 973-4 n.2. Thus, the applicability of New York's notice of claim rule to a money damage claim was not an issue in *Brandon.* Moreover, since the plaintiffs in *Brandon* were seeking to protect the rights of parties not before the court on an important issue, (487 F. Supp. 1219, 1223, n.5), even if the notice of claim rule applied, the "public interest exception" would have rendered New York's notice of claim requirements inapplicable.

In light of the above, it is not accurate to state that the Second Circuit has considered the effect of New York's notice of claim rule to money damage actions under §1983 and reached a contrary result.

Appellant suggests that §1988 should not be used to borrow state notice of claim rules because federal law is not "deficient" with respect to the issue. (Jurisdictional Statement, p. 16). Appellant misreads the Court's decisions on when a deficiency in federal law exists. "Federal law simply does not 'cover every issue that may arise in the context of a federal civil rights action' * * * When federal law is thus deficient, §1988 instructs us to turn to the 'common law, as modified and changed by the Constitution and statutes of the [forum] state' * * *". *Robertson v. Wegmann,* 436 U.S. 584, 588 (1978) (citation omitted).

Appellant's extended discussion on the purported burden that a New York's notice of claim rule would impose on §1983 plaintiffs is irrelevant and inaccurate. (Jurisdictional Statement p. 13-19).

The discussion is not relevant because appellant would reject borrowing New York's notice of claim rule because appellant and other §1983 plaintiffs would lose their cases. The Court has specifically rejected such an approach. "A state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the §1983 plaintiff were the only benchmark, there would be no reason at all to look to state law * * * But §1988 quite clearly instructs us to refer to state statutes; it does not say state law is to be accepted or rejected based solely on which side is advantaged thereby". *Robertson v. Wegmann,* 436 U.S. 584, 593 (1978).

Even if the appellant's reference to the so-called burdensome effect of New York's notice of claim rule on §1983 plaintiffs was relevant, its characterization of the effect of the New York rule is inaccurate. As the Court below noted a §1983 claim will "be barred if the claimant

neither gives notice within 90 days, nor within the next two years and nine months seeks an extension of the right to do so". Jurisdictional Statement p. A-18. In this respect a New York §1983 claimant is less burdened by the rule than, for example, claimants in Tennessee, Ohio, Mississippi, Louisiana and Puerto Rico who are forever barred if suit is not commenced within a year. *Johnson v. Railway Ass'n.*, 421 U.S. 454 (1975) [Tennessee]; *Chardon v. Soto,* 462 U.S. 650 [Puerto Rico], *Mulligan v. Hazard,* 777 F2d 340 (CA6, 1985) cert. den. 106 S. Ct. 2901, rehearing den. 107 S. Ct. 12 (1986) [Ohio]; *Gates v. Spinks,* 771 F2d 916 (CA5, 1985) cert. den. 106 S. Ct. 1378 (1986) [Mississippi]; *St. Amant v. Benoit,* 806 F2d 1294 (CA5, 1987) [Louisiana].

Even if a §1983 claimant fails to file a notice within 90 days, New York's statute and court decisions establish an extremely liberal attitude to permit a late filing. The legislative history behind the 1977 amendments to §50-e of the General Municipal Law shows a legislative encouragement to excuse plaintiffs who fail to meet the initial 90 day filing requirement and a dissatisfaction with past judicial decisions denying late filing applications. "It is intended that older judicial decisions construing the provisions of §50-e rigidly and narrowly will be inapplicable as a result of these remedial amendments which will enable the courts to apply these provisions in a more flexible manner to do substantial justice [p. 288]. * * * The proposed amendment to subdivision 5 would significantly extend the discretion of the court to grant leave to file a late notice of claim. The subdivision, as amended, reflects a substantial change in policy * * * giving the court greater flexibility in exercising discretion in this area * * * Courts [would be] given broad discretion to extend the time to serve a notice of claim beyond the 90 day limit [p. 300-

301]'' Twenty-First Annual Report of N.Y. Judicial Conference, 1978.

In the ten years since the amended 50-e of the General Municipal Law has been applicable, courts have been extremely permissive in authorizing late filings. Contrary to appellant's assertion, there is no need for a claimant to tender an excuse, *Chatman v. White Plains,* 101 AD2d 838 (1984); *Cicio v. N.Y.C.,* 98 AD2d 38 (1982). If municipal officers have prepared reports of the incident (a very common circumstance) late filings are routinely granted. *Inness v. County,* 62 NY2d 779 (1984); *Law v. City of Rochester,* 107 AD2d 1089 (1985); *Cicio, supra.* The statute itself permits a court to take into account ''all relevant facts and circumstances'' Jurisdictional Statement p. 6, §50-e[5]. United States District Courts have permitted late filings in diversity suits and notably have permitted such even in situations where the municipality may have lacked actual notice of all the facts and the notice of claim was a year late. *Palazzo v. City of N.Y.,* 444 F. Supp. 1089 (EDNY, 1978).

Moreover, as the Court below noted a notice of claim need not be served at all if the action is brought to protect an important right. Jurisdictional Statement p. A-19. This so-called ''public interest'' exception has been liberally construed to render notice of claim filings unnecessary. For example, persons aggrieved by governmental action in excess of jurisdiction are exempted from filing [*Niagara Mohawk v. City,* 59 NY2d 262 (1983)]; teachers seeking to be granted tenure need not file, even though only their tenure is at issue, because of the importance of New York's statutory tenure scheme [*Cowan v. Bd. of Ed.,* 99 AD2d 831 (1984)]; plaintiffs generally challenging important governmental action also have been exempted from filing. *Industrial Refuse Systems, Inc. v. O'Rourke,* 509 N.Y.S. 2d 988, 990 (1986).

Simply stated New York's notice of claim rule is a very flexible and fair rule which can be easily satisfied by any §1983 plaintiff. This has been recognized even by courts which have refused to borrow other states' notice of claim rules. *Brown v. U.S.*, 742 F2d 1498 (CADC, 1984, *en banc*) cert. den. 471 U.S. 1073 (1985); *Fuchilla v. Layman,* 210 N.J. Super. 574, 510 A.2d 281 (1986). The *Brown, supra,* majority distinguished New York's notice of claim rules because of "the unusual flexibility of the relevant New York provision; it was subject to waiver by the court if to waive would promote equity or the action would vindicate the public interest". 742 F2d 1498, 1509 n.6.

In conclusion, certiorari should be denied if the appeal is dismissed.

Respectfully submitted,

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APPENDIX A— Pages 26-29 of Brief at Supreme Court, Special Term.

(26) **POINT II.**

Plaintiff's action is not barred by the Notice of Claim provisions of State or Local Law.

Defendant City seeks to dismiss this action on the additional ground that plaintiff did not file a notice of claim within ninety days of the accrual of plaintiff's cause of action. The City relies in part on Section 50-i (1)(c) of the General Municipal Law to support its argument. That section provides in pertinent part:

> 1. No action or special proceeding shall be prosecuted or maintained against a city, county, village, fire district or school district for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city, county, town, village, fire district or school district or of any officer, agent or employee thereof, including volunteer firemen of any such city, county, town, village, fire district or school district or any volunteer fireman whose services have been accepted pursuant to the provisions of section two hundred nine-i of this chapter, unless, (a) a notice of claim shall have been made and served upon the city, county, town, village, fire district or school district in compliance with section fifty-e of this chapter.
>
> . . .

In addition, the City offers the notice of claim requirements of its own Charter Section 8-115, which is broader in scope than the Section 50-i requirements, as a basis for

dismissal. For the reasons which follow, neither section 50-i nor the City Charter (27) requires the service of a notice of claim as a condition precedent to the maintenance of this action.

Further, even assuming that either §50-i or the City Charter provision controls, the City received written notice more than sufficient to satisfy the notice of claim requirements. Accordingly, the notice of claim requirement of 50-i or the City Charter does not preclude the maintenance of this action.

A. The Notice of Claim Requirement of Section 50-i of the General Municipal Law Does Not Apply to This Action.

Plaintiff's action is one for a wrongful deprivation of property in violation of the Constitution. As such, the Complaint alleges an "*injury* to property" rather than a "*damage* to property." For the reasons stated in Point I (B), *supra,* §50-i is not intended to apply to such an action.

Defendant City relies on the case of *Mills v. County of Monroe,* 59 N.Y.2d 307, 464 N.Y.S.2d 709 (1983) for the proposition that plaintiff was required to serve a notice of claim in this action. Defendant's reliance, however, is misplaced. First, and critically, the *Mills* Court, in affirming a specific finding of the Appellate Division, found the notice requirement of the County Law applicable, but *rejected* the municipality's argument that the General Muncipal Law notice of claim requirement barred that plaintiff's action. *See, e.g., Mills v. County of Monroe,* 89 A.D.2d 776, 453 N.Y.S.2d 486 (4th Dept. 1982).
(28) Second, in *Mills,* the plaintiff brought suit under 42 U.S.C. §1981, not section 1983, alleging employment discrimination based on race and national origin. An important component of the Court's decision in *Mills* was that State law provided a closely analogous claim in Executive Law §296. As the Court of Appeals held that the notice of

claim requirements of County Law §52 applied to that "closely analogous" State claim, the notice of claim requirements were also held to apply to a federal civil rights action based on an identical set of facts. By contrast, §1983 has no counterpart in State law, and the *Mills* decision is therefore inapplicable to this case.

Section 50-k(6) of the General Municipal Law lends further support to plaintiff's contention that the Legislature did not intend §50-i to apply to the within action. That section expressly provides that in federal civil rights actions against employees of the City of New York, the notice of claim requirement does not apply. Clearly, the Legislature never intended to require the service of a notice of claim in federal civil rights actions. This legislative intent is consistent with numerous federal cases which held that no notice of claim was required for §1983 actions. *See, e.g., Brandon v. Board of Education,* 487 F. Supp. 1219 (N.D.N.Y.), *aff'd,* 635 F.2d 971 (2d Cir. 1980), *cert.* (29) *denied,* 454 U.S. 1123 (1981); *Laverne v. Corning,* 316 F. Supp. 629 (S.D.N.Y. 1970).

Plaintiff's causes of action are grounded in the constitution, and seek a remedy for a wrongful deprivation of property. The *Mills* court did not decide a deprivation of property case, and indeed, held General Municipal Law §50-i inapplicable to the civil rights case before it.

C. The City Charter Notice Requirement is Preempted by State Law and Cannot Bar this Action.

The City has offered the Notice of Claim requirement of the City Charter §8-115 that a notice of claim be filed for *any* action against the City within the ninety day time period of General Municipal Law §50-e as an additional theory for dismissal. On its face, this local law purports to require notices of claim as a condition precedent to actions not embraced by the General Municipal Law notice requirements. It is respectfully submitted that this local law

is preempted by the General Municipal Law and is of no effect whatsoever here.

The New York State Constitution prohibits the making of local laws which conflict with general state statutes:

> (ii) every local government shall have power to adopt and amend local laws *not inconsistent with* the provisions of this constitution or *any general law* relating to the following subjects . . .
>
> (5) The presentation, ascertainment and discharge of claims against it.

APPENDIX B—Pages 36-44 of Brief for Plaintiff-Appellant in Appellate Division, Fourth Department.

(36)

POINT III

The notice of claim provisions of the General Municipal Law and the Syracuse City Charter cannot constitutionally apply to this case; but even if they do, there was legally adequate compliance therewith.

The court below found that plaintiff did not file a notice of claim within ninety days of the accrual of its cause of action in compliance with Section 50-i (1)(c) of the General Municipal Law. That section provides, in pertinent part:

> 1. No action or special proceeding shall be prosecuted or maintained against a city . . . for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city . . . unless, (a) a notice of claim shall have been made and served upon the city . . . in compliance with section fifty-e of this chapter . . .

In addition, the lower court cited the ninety day requirement of the Syracuse City Charter Section 8-115, which encompasses "broader notice of claim provisions". (21)

A. As a Matter of Federal Law, State and Local Notice of Claim Requirements Do Not Apply to Federal Civil Rights Actions.

Federal law must determine whether a notice of claim provision of state or local law will operate to bar a Sec. 1983 action. *See, e.g., United Auto Workers v. Hoosier Cardinal Corporation,* 383 U.S. 696 (1966). As is the case with statutes of (37) limitations themselves, state courts

merely interpret state notice of claim statutes, but the issue of whether they apply to a federal civil rights action is a matter of federal law, to be determined by the federal courts. *See Pauk v. Board of Trustees,* Point II, *supra; see also Fields v. Board of Higher Education of the City of New York,* Point II, *supra.*

Federal cases have uniformly held that New York's notice of claim statutes cannot bar a federal civil rights action. *See, e.g., Brandon v. Board of Education,* 487 F.Supp. 1219 (N.D.N.Y. 1980), *aff'd,* 635 F.2d 971 (2d Cir.), *cert. denied,* 454 U.S. 1123 (1981); *Glover v. City of New York,* 401 F.Supp. 632, 635 (E.D.N.Y. 1975); *Carrasco v. Klein,* 381 F.Supp. 782, 787, n. 12 (E.D.N.Y. 1974); *Laverne v. Corning,* 316 F.Supp. 629, 637 (S.D.N.Y. 1970).

Any doubt as to this issue was laid to rest by the United States Supreme Court in *Burnett v. Grattan,* cited in Point II, *supra.* The Court, in considering the propriety of state law in relation to federal civil rights claims, said:

> A state law is not "appropriate" if it fails to take in to account practicalities that are involved in litigating federal civil rights claims and policies that are analogous to the goals of the Civil Rights Acts. . . . Litigating a civil rights claim requires considerable preparation. *An injured person must recognize the constitutional dimensions of his injury.* . . . "State legislatures do not devise their limitations period with national interests in mind, and it is the duty of federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies." (Emphasis supplied.)

____ U.S. at ____, 82 L.Ed.2d at 44-46.

(38) The condition precedent of a 90 day notice reflects a narrow state policy of providing repose to municipal officials and providing the opportunity to investigate the facts underlying a tort claim while those facts are still fresh. This policy is "inconsistent with, or or marginal relevance to" the goals of Sec. 1983 in "compensation of persons whose civil rights have been violated, and prevention of the abuse of state power." *Burnett v. Grattan,* ____ U.S. at ____, 82 L.Ed.2d at 47. The Supreme Court, quoting *Pauk, supra,* reaffirmed that:

> It would be anomalous for a federal court to apply a state policy restricting remedies against public officials to a federal statute that is designed to augment remedies against those officials, especially a federal statute that affords remedies for the protection of constitutional rights.

____ U.S. at ____, 82 L.Ed.2d at 48, fn. 18.

Here, moreover, the oppressive conduct of the City of Syracuse was consciously pursued, publicly acknowledged, and frequently censured by the courts of this State. (197-200) (*See* Attachment "B".) Syracuse needed no opportunity to investigate the facts.

The court below, in dismissing plaintiff's Complaint, relied on the decision of the New York Court of Appeals in *Mills v. County of Monroe,* 59 N.Y.2d 307 (1983). The *Mills* court found that the state's notice of claim requirements are not antithetical to the policies underlying the civil rights laws. However, (39) appellant respectfully submits that, in view of the federal supremacy in such matters and in view of the subsequent reasoning of the U.S. Supreme Court in *Burnett, supra,* and the subsequent holding of the Court of Appeals itself in *Fields v. Board of Higher Education,* N.Y.L.J., Oct. 11, 1984, at 5, col. 1

(N.Y. Oct. 9, 1984), the *Mills* decision is no longer authoritative. Even if it were, it is readily distinguishable, as are the cases of *Phelps Steel, Inc. v. City of Glens Falls,* 89 A.D.2d 652 (3d Dept. 1982), and *Alaxanian v. City of Troy,* 69 A.D.2d 937 (3d Dept. 1979), also cited by the court below.

It is critical to note that, in *Mills,* both this Court and the Court of Appeals held that Section 50-i of the General Municipal Law was inapplicable because it ". . . is confined to tort claims for personal injury, wrongful death or damage to property and not to torts generally." *Mills v. County of Monroe,* 89 A.D.2d 776, 776 (4th Dept. 1982), *aff'd,* 59 N.Y.2d 307 (1983).

The inapplicability of §50-i (and hence §50-e) was conclusively established in *Fields, supra.* However, in *Mills,* both this Court and the Court of Appeals proceeded to find that Section 52 of the County Law, *a state statute,* was broader in scope than Section 50-i and did embrace the *Mills* claim for wrongful discharge based on discrimination. Appellant submits that inverse condemnation, like wrongful discharge based on discrimination, is not a claim embraced by Section 50-i. Nor should this Court affirm the lower court's effort to parallel the Charter of the City of Syracuse to the County Law. The Charter is a *local* law, not a *state* law, and hence is pre-empted by the General Municipal Law itself and by the New York Constitution which provides:

> (ii) every local government shall have power to adopt and amend local laws *not inconsistent with the provisions of this constitution or any general law* relating to the following subjects . . .
>
> (5) the presentation, ascertainment and discharge of claims against it.

(6) the acquistion . . . of its . . . property.

N.Y. Const. Art. IX, §2(c). (Emphasis supplied.) To the same effect, *see* Municipal Home Rule Law Section 10(1)(ii)(a)(5) and (6).

The General Municipal Law states: "This section shall be applicable notwithstanding any inconsistent provisions of any law, general, special or local, *or limitation contained in the provisions of any city charter*". General Municipal Law §50-i(2). (Emphasis supplied.) In *Zumbo v. Town of Farmington,* 60 A.D.2d 350 (4th Dept. 1978), this Court relied on this section to strike down a local notice requirement where a local law required prior notice of unsafe town property as a condition precedent to suit, although the General Municipal Law required none.

In dismissing the Town's affirmative defense of failure to give prior notice, this Court stated:

> Where the State has acted upon a subject and, in so acting, has evidenced a desire that its general laws should preempt the possibility of varying local laws, a local enactment may be said to be inconsistent with State law because it prohibits that which has been found acceptable under State law. (Citations omitted.)

60 A.D.2d at 354.

Similarly, in *Matter of 749 Broadway Realty Corp. v. Boyland,* 1 Misc.2d 575 (Sup. Ct. N.Y. Cnty. 1955), *aff'd* 1 A.D.2d 819 (1st Dept. 1956), *aff'd,* 3 N.Y.2d 737 (1957), the Court struck down a city ordinance which imposed requirements in addition to State statutes as a prerequisite for judicial review of tax assessments. In voiding that local law, the Court held that "[c]ities may not curb or control the jurisdiction or procedure of courts" by in-

terposing barriers to review more extreme than state legislation. 1 Misc.2d at 478.

The facts in the *Mills* case did not present the state-local preemption issue. Clearly, since the power to condemn is a sovereign, not a municipal function (absent delegation), *Fifth Avenue Coach Lines, Inc. v. City of New York*, 11 N.Y.2d 342 (1962), a municipality's power to take is limited by Article 5 of the Eminent Domain Procedure Law. Under the EDPL, municipalities must seek an order vesting title and fixing the time within which claims must be filed. Obviously, the City of Syracuse did not do so. Arguably, therefore, no period of limitations ever began to run. Had the City complied with State law and applied to the (42) Court for an order vesting title the plaintiff would have had formal notice of whatever time the Court might have fixed.

The *Fields* case suggests yet another reason for rejecting the application of the Syracuse City Charter's notice of claim provision as preempted by State law. Considering the need for harmony between federal and state limitations periods, the *Fields* Court rejected the applicability of General Municipal Law §50-i's one year and ninety day statute of limitations to civil rights actions. The inapplicability of the limitations period of §50-i necessarily prohibits the applicability of its notice of claim provision. Similarly, the Syracuse City Charter provides a one year and ninety day statute of limitations and a ninety day notice of claim condition precedent to actions which fall within that Charter provision. *See* Syracuse City Charter §8-115. Since the one year and ninety day statute of limitations contained in the City Charter is clearly inapplicable for the same reasons that apply to General Municipal Law §50-i, the Charter's notice of claim requirement must also be inapplicable.

Moreover, it is entirely reasonable to expect that the "public interest" exception discussed by the Court of Ap-

peals in *Mills*, 59 N.Y.2d at 311, should apply here. The public interest in preventing unconstitutional taxation is beyond dispute. *See, e.g., Hurd v. City of Buffalo,* 34 N.Y.2d 628 (1974), *aff'g,* 41 A.D.2d 402 (4th Dept. 1972); *Bethlehem Steel Corporation v. Board* (43) *of Education,* 44 N.Y.2d 831 (1978), *mod'g and aff'g,* 61 A.D.2d 147 (4th Dept.); *Angelone v. City of Rochester,* 72 A.D.2d 445 (4th Dept. 1980), *aff'd,* 52 N.Y.2d 984 (1981). Plaintiff's action can readily be viewed as one whose resolution would directly affect the rights of property owners throughout the State of New York. Syracuse's avowed policy of blatant overtaxation is continuing and this Court should vindicate the rights of the citizens of Syracuse (and of other cities which may follow its example) to fend off confiscatory taxation. To do otherwise would endorse a policy which immerses property owners in protracted litigation and obliges them to continue to pay admittedly illegal taxes which even large corporations like W.T. Grant and well-endowed universities like the University of Rochester are unable to pay on unrentable real estate.

The lower court in applying the "gravamen or essence" test of *Staffen* which is no longer the law in New York in light of *Fields,* apparently relied on *Phelps* because of its clearly mistaken conclusion that this case, like *Phelps,* involved the tort of conversion. Inasmuch as personal property (a building design) was the subject of the action in *Phelps,* the tort of conversion could properly be found. But, it is a hornbook principle of tort law that conversion applies only to personal property; real property cannot be the subject of that common law tort. 23 N.Y. Jur. 2d, (44) *Conversion and Action for Recovery of Chattel,* §4; Prosser, *Torts,* 4th ed. (1971), p. 81.

Since papers filed by plaintiff in this case at the time it obtained the Preliminary Injunction in May of 1979 (164-171, 205) clearly raised the constitutional questions, the rationale employed for dismissing the complaint in the

Alaxanian case is inapplicable here. (*See* Point III (B), immediately following.)

B. Assuming, *Arguendo*, that a Notice of Claim was Required, the Facts Indicate *De Facto* Compliance Therewith.

On May 4, 1979, twenty-five days after the April 2, 1979 Tax Deed, the City of Syracuse was served by plaintiff with an Order to Show Cause on the motion for the Preliminary Injunction restraining the City from transferring the Property to third parties. Paragraph "11" of the affidavit of plaintiff's then attorney, (205) submitted in support thereof, placed the City on notice of its constitutional claims:

> The City's constant return to the 1964 assessment of $1,135,700 amounts to confiscation of plaintiff's property and unconstitutional taxation. . . . (205)

The balance of that affidavit, and the affidavit of Malcolm A. Sutton, also submitted in support of the motion, plainly and unequivocally notified the City of the facts underlying plaintiff's cause of action. (202-216) Plaintiff even asked for alternative relief, in the nature of damages for the taking of the Property. (224)

APPENDIX C—Pages 10-19 of Reply Brief of Plaintiff-Appellant in New York Court of Appeals.

10

POINT II.

The notice of claim provisions of the General Municipal Law and the Syracuse City Charter cannot constitutionally apply to this case; but even if they do, there was legally adequate compliance therewith.

The City continues to urge that this case be dismissed because Plaintiff did not file a notice of claim within ninety days of the accrual of its cause of action in compliance with Section 50-i (1)(c) of the General Municipal Law and Section 8-115(2) of the Syracuse City Charter.

A. As a Matter of Federal Law, State and Local Notice of Claim Requirements Do Not Apply to Federal Civil Rights Actions

As the Supreme Court pointed out in *Wilson v. Garcia* (471 U.S. ____, 85 L.Ed.2d 254 [1985]), *supra*, all questions relating to Section 1983 are federal questions except:

> . . . the length of the limitations period and closely related questions of tolling and application, are to be governed by state law.

(*Wilson v. Garcia*, 262, *supra*).

(See *Pauk v. Board of Trustees*, 654 F.2d 856, 865-866 [CCA2d 1982], cert den 455 U.S. 1000 [1982]; see also *Fields v. Board of Higher Educ. of City of New York*, Point I, *supra*).

When it enacted the Civil Rights Act, Congress did not include the need to file a notice of claim. See *Brown v. United* (11) *States* (742 F.2d 1498, 1506-1509 [D.C.Cir. 1984], cert den 85 L.Ed.2d 509 [1985]). There is no admo-

nition in Section 1988 to look to applicable state or local "notice of claim" requirements similar to its admonition relating to the statute of limitations.

Notice of claim provisions which are found in statutes such as the N.Y. General Municipal Law or Syracuse City Charter are historically linked to the waiver of sovereign immunity. (See e.g. *Luker v. Nelson,* 341 F.Supp. 111, 117 [N.D.Ill. 1972] and *Williams v. Horvath,* 129 Cal Rptr 453, 548 P.2d 1125, 1130 [1976].) However, no state or municipality ever had sovereign immunity from a claim under Section 1983. Had it been otherwise, the supremacy clause of the United States Constitution and congressionally created rights thereunder would have been eviscerated by state and local concepts of sovereign immunity and the federal policy of augmenting constitutional remedies would have been fatally undermined (*Donovan v. Reinbold,* 433 F.2d 738, 742 [CCA9th 1970]; *Williams v. Horvath, supra; Brown v. United States, supra; Altaire Bldrs. v. Village of Horseheads,* 551 F.Supp. 1066, at 1076 [W.D.N.Y. 1982]; Also see *Owen v. City of Independence,* 445 U.S. 622, 635-637 [1980].)

As discussed in *Burroughs v. Holiday Inn* (606 F.Supp 629, affd on reh 621 F.Supp 351 [W.D.N.Y. 1985]), not every silence in the federal law is a gap or void to be filled by state law.

(12) Many other federal cases have consistently held that New York's notice of claim statutes cannot bar a Federal civil rights action. (See, *Brandon v. Board of Educ.,* 487 F.Supp. 1219 [N.D.N.Y. 1980]), affd 635 F.2d 971 [CCA2d 1980], cert den 454 U.S. 1123 [1981]; *Williams v. Allen,* 616 F.Supp. 653, 658 [E.D.N.Y. 1985]; *Glover v. City of New York,* 401 F.Supp. 632, 635 [E.D.N.Y. 1975]; *Carrasco v. Klein,* 381 F.Supp. 782, 787 n.12 [E.D.N.Y. 1974]; *Laverne v. Corning,* 316 F.Supp. 629, 637 [S.D.N.Y. 1970].)

The conceptual imperative for rejecting notice of claim provisions is evident from a reading of the decisions of the United States Supreme Court in *Wilson v. Garcia, supra* and *Burnett v. Grattan* (468 U.S. 42, 104 S.Ct. 421, 82 L.Ed.2d 36 [1984].) The *Burnett* Court, in considering the propriety of state law in relation to Federal civil rights claims, said:

> A state law is not "appropriate" if it fails to take into account practicalities that are involved in litigating federal civil rights claims and policies that are analogous to the goals of the Civil Rights Acts. . . . Litigating a civil rights claim requires considerable preparation. *An injured person must recognize the constitutional dimensions of his injury.* . . . "State legislatures do not devise their limitations period with national interests in mind, and it is the duty of federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies." (Emphasis supplied.)

(*Burnett v. Grattan,* 468 U.S. 42, 50-52, 82 L.Ed.2d, 44-46, *supra*).

(13) The condition precedent of a 90 day notice reflects a narrow state policy of providing repose to municipalities and providing the opportunity to investigate the facts underlying a tort claim while those facts are still fresh. This policy is "inconsistent with, or of marginal relevance to" the goals of Section 1983 in "compensation of persons whose civil rights have been violated, and prevention of the abuse of state power." *Burnett v. Grattan* (468 U.S. 42, 53, 82 L.Ed.2d 36, 47 [1984] *supra*). The Court, quoting *Pauk, supra,* went on to say:

> It would be anomalous for a federal court to apply a state policy restricting remedies against public officials to a federal statute that is designed to augment remedies against those officials, especially a federal statute that affords remedies for the protection of constitutional rights.

(*Burnett v. Grattan,* 468 U.S. 42, fn 18, 82 L.Ed.2d 36, *supra*).

Here, moreover, the oppressive conduct of the City of Syracuse was consciously pursued, publicly acknowledged, and frequently censured by the courts of this State (197-200). (*See* Attachment "C" to Plaintiff's brief in chief.) Syracuse needed no opportunity to investigate the facts.

Special Term, in dismissing Plaintiff's Complaint, relied on the decision of this Court in *Mills v. County of Monroe,* 59 N.Y.2d 307 (1983). The *Mills* court found that the State's notice of claim requirements are not antithetical to the policies underlying (14) the Civil Rights Law. However, Plaintiff respectfully submits that, in view of the federal supremacy in such matters and in view of the subsequent holdings of the U.S. Supreme Court in *Burnett and Wilson, supra,* and the subsequent holding of this court in *Fields v. Board of Higher Educ. of City of New York* (63 N.Y.2d 817 [1984]), the *Mills* decision is no longer authoritative.

Mills, Cardo v. Lakeland Cent. School Dist. (592 F.Supp. 765 [S.D.N.Y. 1984]) and *Indiana Dept. of Public Welfare v. Clark* (478 N.E.2d 699 [CT.App. Ind. 1985]), each seek to ascertain whether a notice of claim is needed by looking to the gravamen of the underlying cause of action. These cases all predate *Wilson v. Garcia, supra* which expressly rejected that approach in the interest of uniformity of remedies for Section 1983 violations.

We respectfully urge this Court to now expressly repudiate *Mills*. But, even if the *Mills* case has some vitality, it is readily distinguishable, as are the cases of *Phelps Steel v. City of Glens Falls* (89 A.D.2d 652 [3d Dept. 1982]), and *Alaxanian v. City of Troy* (69 A.D.2d 937 [3d Dept. 1979]), also cited by the City in its answering brief.

The *Mills* case involved the applicability of the County Law Section 52 notice of claim provision to a Civil Rights claim based on a wrongful discharge. Both the Appellate Division and this court held that Section 50-i of the General Municipal Law was inapplicable because it ". . . is confined to tort claims for (15) personal injury, wrongful death, or damage to property and not to torts generally" (*Mills v. County of Monroe,* 89 A.D.2d 776, 776 [4th Dept. 1982], affd, 59 N.Y.2d 307 [1983].)

However, the courts then proceeded to find that Section 52 of the County Law, *a State statute,* was broader in scope than Section 50-i and did embrace the *Mills* claim for wrongful discharge based on discrimination. Plaintiff submits that inverse condemnation, like wrongful discharge based on discrimination, is not a claim embraced by Section 50-i. Moreover, to parallel the Charter of the City of Syracuse to the County Law is not justified by *Mills*. The Charter is a *local* law, not *state* law, and hence is pre-empted by the General Municipal Law itself and by the New York Constitution which provides:

> (ii) every local government shall have power to adopt and amend local laws *not inconsistent with the provisions of this constitution or any general law* relating to the following subjects . . .
> (5) the presentation, ascertainment and discharge of claims against it.
> (6) the acquisition . . . of its . . . property.

N.Y. Const. Art. IX, §2(c). (Emphasis supplied.) To the same effect, *see* Municipal Home Rule Law Section 10(1)(ii)(a)(5) and (6).

The General Muncipal Law states: "This section shall be applicable notwithstanding any inconsistent provisions of law, (16) general, special or local, *or any limitation contained in the provisions of any city charter*" (General Municipal Law §50-i[2] [Emphasis supplied].) In *Zumbo v. Town of Farmington* (60 A.D.2d 350 [4th Dept. 1978]), the Appellate Division relied on this section to strike down a local notice requirement where a local law required prior notice of unsafe town property as a condition precedent to suit, although the General Municipal Law required none.

In dismissing the Town's affirmative defense of failure to give prior notice, the Appellate Division stated:

> Where the State has acted upon a subject and, in so acting, has evidenced a desire that its general laws should preempt the possibility of varying local laws, a local enactment may be said to be inconsistent with State law because it prohibits that which has been found acceptable under State law. (Citations omitted.)

(*Zumbo v. Town of Farmington*, 60 A.D.2d 350, 354, *supra*).

Similarly, in *Matter of 749 Broadway Realty Corp. v. Boyland* (1 Misc.2d 575 [Sup.Ct. N.Y. Cnty. 1955], affd 1 A.D.2d 819 [1st Dept. 1956], affd 3 N.Y.2d 737 [1957]), this Court struck down a city ordinance which imposed requirements in addition to state statutes as a prerequisite for judicial review of tax assessments. In voiding that local law, this Court held that "[c]ities may not curb or control the jurisdiction or procedure of courts" by interposing barriers to review more extreme than state legislation

(17) (*Matter of 749 Broadway Realty Corp. v. Boyland,* 1 Misc.2d 575, 578, *supra*).

A further distinguishing factor is the fact that the *Mills* case did not present the state-local preemption issue. Clearly, since the power to condemn is a sovereign, not a municipal function (absent delegation), *Fifth Avenue Coach Lines v. City of New York* (11 N.Y.2d 342 [1962]), a municipality's power to take real property is limited by Article 5 of the Eminent Domain Procedure Law. Under the EDPL, municipalities must seek an order vesting title and fixing the time within which claims must be filed. Obviously, the City of Syracuse did not do so. Arguably, therefore, no period of limitations ever began to run. Had the City complied with State law and applied to the Court for an order vesting title, the Plaintiff would have had formal notice of whatever time the Court might have fixed.

The *Fields* case *supra,* suggests yet another reason for deeming the Syracuse City Charter's notice of claim provision to be preempted by State law. As the one year and ninety day statute of limitations contained in the City Charter is clearly inapplicable for the same reasons that apply to General Municipal Law Section 50-i, the Charter's notice of claim requirement must also be inapplicable.

Moreover, it is entirely reasonable to expect that the "public interest" exception discussed by this Court in *Mills,* (59 (18) N.Y.2d 307, 311, *supra*) should apply here. The public interest in preventing unconstitutional taxation is beyond dispute (See, e.g., *Hurd v. City of Buffalo,* 34 N.Y.2d 628 [1974], affg 41 A.D.2d 402 [4th Dept. 1973]; *Bethlehem Steel Corp. v. Board of Educ.,* 44 N.Y.2d 831 [1978], modfg and affg 61 A.D.2d 147 [4th Dept. 1978]; *Angelone v. City of Rochester,* 72 A.D.2d 445 [4th Dept. 1980], affd 52 N.Y.2d 984 [1981].) Plaintiff's action can

readily be viewed as one whose resolution would directly affect the rights of property owners throughout the State of New York. Syracuse's avowed policy of blatant overtaxation and of taking property by means of such overtaxation is continuing and this Court should vindicate the rights of the citizens of Syracuse (and of other cities which may follow its example) to fend off confiscatory taxation. To do otherwise would endorse a policy which immerses property owners in protracted litigation and obliges them to continue to pay admittedly illegal taxes which even large corporations like W.T. Grant and well-endowed universities like the University of Rochester are unable to pay on unrentable real estate (see *Williams v. Allen*, 616 F.Supp. 653, 658 [E.D.N.Y. 1985], *supra*).

Special Term apparently relied on *Phelps* because of its clearly mistaken conclusion that this case, like *Phelps*, involved the tort of conversion. Inasmuch as personal property (a building design) was the subject of the action in *Phelps*, the tort of (19) conversion was present. But, it is a hornbook principle of tort law that conversion applies only to personal property; real property cannot be the subject of that common law tort (23 N.Y. Jr.2d, *Conversion and Action for Recovery of Chattel*, §1, pp 207-208; Prosser, *Torts*, 4th ed. [1971], p. 81).

Since papers filed by Plaintiff in this case at the time it obtained the Preliminary Injunction in May of 1979 (164-171, 205, 229) clearly raised the constitutional questions, the rationale employed for dismissing the complaint in the *Alaxanian* case is inapplicable here. (*See* Point II (B), immediately following.)

B. Assuming, Arguendo, that a Notice of Claim was Required, the Facts Indicate *De Facto* Compliance Therewith.

On May 4, 1979, twenty-five days after the April 2, 1979 Tax Deed, the City of Syracuse was served for the Preliminary Injunction restraining the City from transfer-

ring the Property to third parties. Paragraph "11" of the affidavit of Plaintiff's then attorney, submitted in support thereof, placed the City on notice of its constitutional claims:

> The City's constant return to the 1964 assessment of $1,135,700 amounts to confiscation of plaintiff's property and unconstitutional taxation. . . . (205)

The balance of that affidavit, and the affidavit of Malcolm A. Sutton, also submitted in support of the motion, plainly and

APPENDIX D—Summons and Complaint.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF ONONDAGA.

423 SOUTH SALINA STREET, INC.,

Plaintiff,

against

THE CITY OF SYRACUSE, A Municipal Corporation, and the METROPOLITAN DEVELOPMENT FOUNDATION OF CENTRAL NEW YORK, INC., a Not for Profit Corporation, and AMLEA (NEW YORK) INC., a Business Corporation,

Defendants.

Index No. 84-633

To the above named Defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is

complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, February 28, 1984

MOUSAW, VIGDOR, REEVES,
HEILBRONNER & KROLL
James S. Grossman, Esq. of Counsel
Attorney(s) for Plaintiff
Office and Post Office Address
600 First Federal Plaza
Rochester, New York 14614
(716) 325-2500

Complaint

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF ONONDAGA.

423 SOUTH SALINA STREET, INC.,

Plaintiff,

vs.

THE CITY OF SYRACUSE, a Municipal Corporation, THE METROPOLITAN DEVELOPMENT FOUNDATION OF CENTRAL NEW YORK, INC., a Not-For-Profit Corporation and AMLEA (NEW YORK), INC., a Business Corporation,

Defendants.

Index No. 84-633

Plaintiff, by its attorneys Mousaw, Vigdor, Reeves, Heilbronner & Kroll, for its Complaint, alleges as follows:

PRELIMINARY STATEMENT

1. This is an action for monetary damages against the above-named defendants to redress violations of rights secured to plaintiff by 42 United States Code (U.S.C.) Section 1983, Section 1985 and Section 1986 and by the Con-

stitution of the United States, and by the Constitution of the State of New York and for ancillary equitable relief. Plaintiff is the equitable owner of certain real property (hereinafter the "Property") located in the City of Syracuse, County of Onondaga, State of New York. Plaintiff seeks damages against defendant the City of Syracuse for the unconstitutional actions detailed below, and an Order vacating the deed of the Property to the City of Syracuse, the deed from the City of Syracuse to the Metropolitan Development Foundation of Central New York, Inc., and the deed from the Metropolitan Development Foundation of Central New York, Inc. to Amlea (New York) Inc.

THE PARTIES

2. Plaintiff was at all relevant times hereafter mentioned, a corporation duly organized and existing under the laws of the State of New York with its principal place of business in Syracuse, New York. On or about September 24, 1980, the corporation was dissolved and brings this action with the authority granted pursuant to Section 1006(a)(4) of the Business Corporation Law of the State of New York.

3. Defendant City of Syracuse (hereinafter the "City") is a municipal corporation organized and existing under the laws of the State of New York.

4. Upon information and belief, Defendant Metropolitan Development Foundation of Central New York, Inc. (hereafter the "Foundation") is a not for profit corporation organized under the laws of the State of New York with a place of business at the State Tower Building, Syracuse, New York.

5. Upon information and belief, Defendant Amlea (New York) Inc. (hereinafter "Amlea") is a business corporation organized under the laws of the State of New York with a place of business in Syracuse, New York.

THE PROPERTY

6. The Property is located in the City of Syracuse, County of Onondaga, in Block Number 116 of the County of Onondaga Clerk's Index of Blocks, and is commonly referred to as 425-427 South Salina Street.

7. From December of 1944 until September of 1976, the Property was owned by the University of Rochester. On or about September 26, 1976, the Property was purchased by plaintiff herein. From 1944 through January, 1976, W.T. Grant Company (hereinafter referred to as "Grants") was the sole tenant and occupant of the Property. The Property was and is commercial property.

CLAIMS

8. Beginning in 1964 through 1980 plaintiff and Grants, its predecessor in interest, commenced tax assessment proceedings for the tax years 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979 and 1980 against the Commissioner of Assessment of the City, defendant Srogi herein, seeking review and correction on the merits of the Tax Commission's final assessed valuation of the Property on the grounds of over-valuation and inequality. When utilizing the appropriate equalization rates, the assessed values of $1,135,700 (1964-1978) and $1,054,450 (1979-1980) indicate that the City considered the full value of the Property to range between $2,271,400 to $3,905,370.

9. On December 14, 1972, Grants recovered a judgment (hereinafter referred to as the "1972 Judgment") on its assessment proceedings against the City for $276,400.19 resulting from over-assessments for the years 1964 through 1970 (hereinafter the "1964 through 1970 Proceedings"). The assessment reductions and tax refunds ordered by the trial court are set forth in Paragraphs 54 and 56 hereof.

10. The City refused to pay the 1972 Judgment mentioned in Paragraph 9 herein. Rather, on December 14, 1972, the City filed a Notice of Appeal, to the New York Supreme Court, Appellate Division, Fourth Department (hereinafter referred to as the "Appellate Division"), thus obtaining a statutory stay under New York Civil Practice Law and Rules 5519(a). This Appeal is hereinafter referred to as the "1972 Appeal."

11. Pending the 1972 Appeal, the City continued to assess the Property as $1,135,700 (hereinafter the "Unlawful Assessment"), despite the 1972 Judgment.

12. Pending the 1972 Appeal, Grants encountered severe financial difficulties nationally and was sorely in need of funds. In 1975, Grants filed a petition under Chapter 11 of the United States Bankruptcy Laws.

13. In March of 1975, pending a motion by the taxpayer to dismiss the 1972 Appeal for failure to prosecute, the City offered to refund overpayments, but only on the following terms:

A. The City would refund the amount of $240,000 of the $276,400.19 1972 Judgment at the rate of $80,000 per year, but only if Grants remained open for business at this location in 1975, 1976 and 1977.

B. The City would refund or credit to future taxes, any over-payments for the years 1971 through 1975 if the New York courts were ultimately to find the Property over-assessed, but only if the courts determined that the taxpayer had over-paid by more than $120,000.00, and then only in the amount by which the courts determined that the overpayment, multiplied by two, exceeded $240,000.00.

C. The City agreed to review the assessment of the Property prior to September 1, 1975.

14. Grants, at that point desperate for funds, agreed to the terms offered by the City and recited in Paragraph 13 hereof and the City's 1972 Appeal was terminated. A copy of this Settlement Agreement is attached hereto and made a part hereof as Exhibit A.

15. The City paid $80,000 to Grants in 1975. No further payment, either under the $276,400.19 1972 Judgment or the $240,000.00 Settlement Agreement have been made. Because of continuing financial difficulties, Grants was forced to close its store on the Property in January, 1976.

16. Despite the 1972 Judgment, and despite the obligation to reassess the Property set forth in Paragraph 12(c) hereof, the Unlawful Assessment for the Property was not changed, and continued at $1,135,700 for tax years 1976, 1977 and 1978.

17. On September 26, 1976, Plaintiff herein purchased the Property from the fee holder, the University of Rochester, and took title subject to the outstanding taxes for the first two (2) quarters of the tax year 1976. The deed to plaintiff is recorded in the Onondaga County Clerk's Of-

fice, at Liber 2598 of Deeds at page 326 & c. At the time, while taxes for all prior years had been paid, (despite the City's refusal to pay refunds), the University of Rochester had not paid the taxes for the first two quarters of 1976.

18. The assessment proceedings for tax years 1971 through 1976 (hereinafter the "1971 through 1976 Proceedings") were tried before the Honorable Justice Henry A. Hudson (J.S.C.), on or about May 3, 1976. At that time, by Assignment of the Appellate Division, attached hereto and made a part hereof as Exhibit B, Justice Hudson was the sole judge appointed to hear tax certiorari matters in Onondaga County.

19. Justice Hudson retired from the bench on or about December 31, 1977. At that time, no decision on *any* tax assessment proceeding heard during Justice Hudson's term, including the 1971 through 1976 Proceedings, had been issued.

20. In February, 1978, plaintiff moved to have the 1971 through 1976 Proceedings retried on the basis that Justice Hudson had retired without issuing a decision. At that time, plaintiff was advised to withdraw its motion and that a decision was forthcoming on the 1971 through 1976 Proceedings.

21. In late February, 1978, the decision of Justice Hudson, dated December 30, 1977, was issued. This decision encompassed not only the 1971 through 1976 Proceedings, but other unrelated proceedings as well. In his decision, Justice Hudson explained the delay in reaching a decision on all of these cases as follows:

> "The difficulties which were encountered in completing the negotiations toward settlement ex-

tended over a year and were, in the Court's opinion, not justified. They arose primarily because the officials of the respondent [the City] would not proceed diligently in acting upon proposals which were recommended by their counsel and which the Court was led to believe would be promptly processed and acted upon. The Property owners in many of the cases and particularly those involving the retail store properties indicated their willingness to cooperate with the Court upon the basis which would provide treatment substantially equal with that already reached with other Property owners in the same general category.

Upon the completion of the settlement of the S.A. & K. Building and Empire Building cases, a number of problems arose which made it obvious that the respondent would not be in a position to proceed with the remaining cases assigned to the Court. These included the resignation of the Corporation Counsel and his replacement with one with no prior knowledge of the litigation; the appointment of the Special Corporation Counsel who had handled all of the respondent's certiorari litigation for the previous four or five years to be a judge of the Court of Claims; the failure of the respondent to obtain a successor; the release of the respondent's appraiser from further service as such; the inability of respondent to find a replacement; and the continued failure of the new Corporation Counsel and the Mayor, who had taken over the settlement negotiations, to cooperate with the Court in completing those negotiations which had appeared to be on the verge of settlement. The Court in December 1976 advised counsel that he would not try any further cases as he intended to retire December 31, 1977, and had received his reg-

ular assignments for 1977. The Court continued throughout 1977 to urge the respondent to reach a decision on all of the cases which had been tried, at least two of which the Court had been assured had been tentatively approved. A decision in all of the cases was purposely withheld as it was felt the pending negotiations might well be prejudiced thereby." (See Exhibit D attached hereto).

22. On April 21, 1978, Justice Richard Aronson (J.S.C.), who succeeded Justice Hudson as the sole judge for tax assessment proceedings in Onondaga County, issued an Order based upon the opinion of the Justice Hudson, dated December 30, 1977, directing that the taxpayer recover a judgment on the 1971 through 1976 Proceedings (hereinafter the "1977 Judgment") in the amount of $239,695.68 plus interest and costs, for a total of $247,461.68 against the City for back taxes resulting from overassessments. A copy of this Order, and the portion of opinion of Justice Hudson, are together attached hereto and made a part hereof as Exhibit C.

23. The reductions in full market value, assessed value, and the proper tax, as reflected in the 1977 Judgment for tax years 1971 through 1976, are as follows:

	Full Market Value		**Assessed Value**	
Year	**City**	**Court**	**City**	**Court**
1971	$2,523,778	$1,820,000	$1,135,700	$823,500
1972	2,523,778	1,830,000	1,135,700	823,500
1973	2,641,163	1,670,000	1,135,700	718,100
1974	2,641,163	1,670,000	1,135,700	718,100
1975	2,839,250	1,510,000	1,135,700	604,000
1976	2,839,250	1,510,000	1,135,700	604,000

Year	Tax Assessed City	Court
1971	$119,373.43	$86,558.09
1972	122,939.53	89,143.88
1973	116,908.96	73,921.21
1974	113,183.86	71,565.85
1975	122,462.53	65,129.32
1976	128,504.46	68,342.60

24. The City did not satisfy the 1977 Judgment described in paragraphs 22 and 23 hereof, but on May 4, 1978 the City filed a Notice of Appeal to the Appellate Division thereby obtaining a statutory stay under New York Civil Practice Law and Rules 5519(a) of enforcement of the 1977 Judgment. This Appeal is hereinafter referred to as the "1978 Appeal."

25. In April of 1979, the plaintiff moved the Appellate Division to dismiss the 1977 Appeal and the Appellate Division Ordered the City to perfect the 1977 Appeal by June 1, 1979. Rather than having the 1977 Appeal dismissed, the City, under compulsion of the Appellate Division Order, filed the necessary papers by the required date.

26. On or about May 1, 1979, prior to perfection of the 1977 Appeal, the then counsel for plaintiff was informed that the City had taken a tax deed (hereinafter referred to as the "City Deed") for the Property for non-payment of the 1976 taxes. The City Deed was recorded in the Onondaga County Clerk's office on April 9, 1979 in Liber 2708 of Deeds at Page 64 &c. A copy of the City Deed is attached hereto and made a part hereof as Exhibit D.

27. According to the recitations contained in the City Deed, the City purportedly conducted a "tax sale" on April 6, 1977 at which the City was the highest bidder.

The City's "bid" was the amount of unpaid 1976 taxes, plus interest, or $139,058.21. The City claims this bid to be the highest bid received (*see* Exhibit D) on Property determined by the City to have a full market value in 1977 of approximately $3,289,024.00.

28. By Order of Justice Aronson (J.S.C.), entered May 17, 1979, the City was enjoined from transferring title to the Property to any third party pending final determination of the 1971 through 1976 Proceedings, as well as assessment proceedings instituted for 1977 through 1979. A copy of this Order (hereinafter referred to as the "Preliminary Injunction") is attached hereto and made a part hereof as Exhibit E.

29. On May 18, 1979, the City filed a Notice of Appeal from the Preliminary Injunction to the Appellate Division.

30. By unanimous decision on the 1977 Appeal, dated December 14, 1979, the Appellate Division (the Hon. Richard D. Simons, J.), further reduced the assessments on the Property by nearly half again the reduction of the 1977 Judgment, resulting in the total refunds due of $353,734.81, plus interest and costs, for the 1971 through 1976 Proceedings. Further, at the same time and by the same decision, the Appellate Division affirmed the Preliminary Injunction. A copy of those Orders and this decision are together attached hereto and made a part hereof as Exhibit F.

31. Again refusing to satisfy the 1977 Judgment, as modified by the Appellate Division, by Notices of Appeal dated February 26, 1980 and April 3, 1980, the City appealed (hereinafter referred to as the "Final Appeals") the Orders of the Appellate Division further reducing the as-

sessments and affirming the Preliminary Injunction to the New York Court of Appeals. Again, by appeal, the judgment to refund taxes was stayed. After plaintiff's counsel served a twenty (20) day demand in October of 1980 pursuant to the Rules of the Court of Appeals, the City finally served the required papers on or about November 5, 1980, and its appeals were perfected.

32. By decision dated April 9, 1981, the Court of Appeals affirmed the Order of the Appellate Division reducing the assessments, and judgment for the 1971 through 1976 proceedings was finally entered in the amount of $353,734.81, plus interest and costs. This judgment is hereinafter referred to as the "Final Judgment." By the same decision, while confirming the pattern of conduct of the City and its officials as detailed by the Appellate Division, the Court of Appeals reversed the Appellate Division's affirmance of the Preliminary Injunction on other grounds. A copy of this decision is attached hereto and made a part hereof as Exhibit G.

33. The City paid the Final Judgment to the Bankruptcy trustee charged with administering the estate of W. T. Grant Company under the United States Bankruptcy Code.

34. Pursuant to Paragraph 2 of the Settlement Agreement attached hereto as Exhibit A, and the provisions therein for adjusting the Final Judgment, the amount due to the taxpayer for refunds of taxes finally determined on the 1971 through 1976 Proceedings is $471,832.76, an amount equal to $118,097.95 more than the Final Judgment.

35. The City has refused to pay the amount due under the Settlement Agreement, and upon information and be-

lief, despite the benefits reaped by the City for tax years 1969 through 1970 under the Settlement Agreement, the City now claims that that Settlement Agreement does not bind the City as to tax years 1971 through 1976.

36. The tax assessed by the City for tax year 1976 alone claimed was $128,504.46. As reduced by the Appellate Division and affirmed by the Court of Appeals, the total tax due for tax year 1976 alone is only $42,997.00.

37. The Property taken by the City was thus taken for non-payment of taxes finally determined to be only $42,997.00, while the refund due pursuant to the Settlement Agreement, which the City now refuses to honor, equals $471,832.76.

38. Tax assessment proceedings were instituted on behalf of plaintiff for the years 1977, 1978, 1979 and 1980. However, without legal title to the Property, plaintiff did not have the financial ability to finance the continuation of such proceedings. These proceedings were accordingly dismissed in 1981 for failure to prosecute.

39. All of the assessment proceedings, including but not limited to that for tax year 1976, have been deliberately and successfully delayed by defendants by means including, but not limited to, the following wrongful patterns of conduct and practices:

a. The City has continuously insisted that one appraiser only and one attorney only must represent it in all assessment cases, despite the large number of such cases filed each year.

b. The City has assured trial courts that it would act upon its own counsel's recommendations with due

speed. The City has, however, been uncooperative in acting on its counsel's recommendations and has thereby delayed decisions by these courts.

c. The City has delayed each and every appeal in the tax assessment proceedings until ordered or required to perfect such appeal upon penalty of dismissal. (*See* Exhibits C, F and G).

40. Despite court rulings, the Settlement Agreement, and promises to review the assessments, the City has continuously restored the Unlawful Assessment of $1,135,700 on the Property each and every year from 1964 through 1978. Such assessement was minimally reduced to $1,054,450 for tax years 1979 and 1980. These assessments are substantially in excess of every assessment determined to be lawful by the courts of the State of New York. The taxpayer has thus been given the choice between perpetual assessment proceedings with attendant appeals or payment of a tax which the courts have repeatedly held to be two to four (2-4) times the lawful tax.

41. By New York State law, unless modified by local law, a taxpayer is required to pay the full amount taxed, no matter how great, even though assessment review proceedings have been instituted. With respect to the periods in question here, if a refund was found due, the City was required to pay only three percent (3%) interest to the taxpayer on unlawfully collected taxes.

42. The City has no law or practice authorizing partial payment of assessed taxes pending assessment review proceedings. Thus the only way to prevent taking of the Property for non-payment of taxes would have been to pay to the City the unlawfully assessed tax of $128,504.40 for 1976, the unlawful assessed tax of $138,600.82 for 1977,

the unlawful assessed tax of $143,739.19 for 1978, the unlawfully assessed tax of $126,976.87 for 1979 and the unlawfully assessed tax of $133,324.65 for 1980, with hope of an eventual refund many years in the future.

43. Pending the Final Appeals to the Court of Appeals, and after plaintiff learned that the City had, contrary to its policy, taken a tax deed (*see* paragraph 26 hereof), and prior to the expiration of the redemption period, plaintiff, by its counsel, offered to pay the taxes determined by the Appellate Division for 1976 (and subsequently affirmed by the Court of Appeals) to redeem the Property from the tax sale. In addition, plaintiff offered to pay taxes for the years 1977, 1978, 1979 and 1980, as determined in a like manner. The City, by defendant Alexander, refused to accept such proposals.

44. In 1975, the annual income from the Property, including rent charged under the Lease of the entire Property, was only $80,000. In an attempt to retain the sole tenant (Grants), that amount was reduced to only $40,000 a year. Prior to the closing of Grants, the amount assessed by defendants in real property taxes alone thus equaled more than *three* (3) times the annual income from the Property.

45. Customarily, commercial tenants pay all or a substantial portion of real property taxes. Following the closing of Grants, plaintiff extensively offered the Property for sale or lease. However, all potential lessees and purchasers ultimately refused to rent or buy because of the onerous and unlawfully excessive taxes.

46. Since the City took title to the Property it has rented or leased a portion of the Property to Onondaga Savings Bank. Upon information belief, the City has been

able to so rent the Property because it has not been required to pay deliberately excessive real Property taxes.

47. Resolution of the 1964 assessment proceeding took 11 years, even without final appeals. Similarly, refunds for 1971 were not paid until 1981. The 1976 assessment proceeding was not finally resolved until 1981. The 1977 through 1980 proceedings have been mooted and may thus never be resolved.

48. Despite substantial efforts, plaintiff was unable to obtain the necessary money for excessive tax payments, on the basis that such sums would be recovered at only 3% interest years hence after extensive litigation and appeals.

49. The taxes assessed, as compared to the taxes found due by the courts of New York, for tax years 1964 through 1980, are approximately as follows:

	Tax Assessed	
Year	**City**	**Court**
1964	$ 85,472.78	$ 55,842.92*
1965	90,606.15	59,196.78*
1966	93,104.69	67,633.50*
1967	97,931.41	63,982.66*
1968	103,655.34	60,375.11*
1969	113,002.15	65,819.25*
1970	107,846.07	60,024.22**
1971	119,373.43	56,759.40**
1972	122,939.53	58,455.00**
1973	116,908.96	42,050.99**
1974	113,183.86	40,711.11**
1975	122,462.53	40,975.40**
1976	128,504.46	42,997.00**
1977	138,600.83	

	1978	143,734.19	
	1979	126,976.87	
	1980	133,324.65	
Total:	1964-1976	$1,414,991.36	$714,823.36
	1971-1976	723,372.77	281,948.90
	1964-1980	1,957,627.90	855,544.56***

*as reduced by trial court
** as reduced by Appellate Division
***assuming 1976 assessment for 1977-80

50. The defendants have engaged in a continuous and consistent pattern and practice of overassessment of many properties in downtown Syracuse, and upon information and belief, have engaged in such practice in part so as to raise funds without violating the letter of the New York Constitutional debt limit. Even if the City finally paid a tax refund, as a result of these overassessments, it would have had the use of the overpayments for years at the rate of 3% interest per annum. The City thus "borrowed" from the taxpayer in excess of its debt limitation at an interest rate far below that available to the City.

51. The full and assessed values, as determined by the City and its agents, together with the equalization ratios and the full and assessed values as found by the courts of New York for tax years 1964 through 1980, are approximately as follows:

Year	Full Market Value City	Full Market Value Court	Equalization Rate**	Assessed Value City	Assessed Value Court
1964	$2,523,778	$1,650,000*	45%	$1,135,700	$742,000
1965	2,523,778	1,650,000*	45	1,135,700	742,000
1966	2,271,400	1,650,000*	50	1,135,700	825,000
1967	2,523,778	1,650,000*	45	1,135,700	742,000
1968	2,523,778	1,470,000*	45	1,135,700	661,500
1969	2,523,778	1,470,000*	45	1,135,700	661,500
1970	2,641,163	1,470,000*	43	1,135,700	632,100
1971	2,523,778	1,200,000	45	1,135,700	540,000
1972	2,523,778	1,200,000	45	1,135,700	540,000
1973	2,641,163	950,000	43	1,135,700	408,500
1974	2,641,163	950,000	43	1,135,700	408,500
1975	2,839,250	950,000	40	1,135,700	380,000
1976	2,839,250	950,000	40	1,135,700	380,000
1977	3,289,024		34.04	1,135,700	
1978	3,719,948		30.53	1,135,700	
1979	3,792,986		27.80	1,054,450	
1980	3,905,370		27	1,054,450	

*By decision of the trial court, pending appeal, prior to Settlement between the parties.

**Equalization Rates 1968-1976—as determined by Appellate Division: 1977-80—as established by the State Board of Equalization and Assessment.

52. Upon information and belief, the City is served with approximately 150 assessment reduction proceedings each year. Nearly all of these proceedings involve downtown commercial properties which the courts of New York have determined previously, on one or more occasions, to be substantially and unlawfully over-assessed.

53. Upon information and belief, it is highly unusual for the City to take title to downtown Syracuse properties by tax deed unless the City has a predetermined use for

such property. The plaintiff's Property was in this instance singled out for taking by defendants.

54. In or about December, 1981, upon application by the City, the United States government awarded the City $7.5 million Urban Development Action Grant ("UDAG") for construction of a shopping mall and office complex (hereinafter the "Syracuse Market Center").

55. The UDAG grant and the Syracuse Market Center were first made public during the latter part of December, 1981. A newspaper article announcing the same, published on December 23, 1981 is attached hereto and made a part hereof as Exhibit H. This information was not before any court on the assessment proceedings or appeals mentioned above.

56. The Syracuse Market Center includes the Property, and, upon information and belief, the Property is the key parcel to the Syracuse Market Center.

57. By its unlawful and intentional overreaching conduct, not only has the City acquired a valuable parcel of property on the basis of unpaid overstated 1976 taxes, ($128,504.46), it has also turned a cash profit in excess of these 1976 taxes, amounting to more than three (3) times the taxes found due by the Court of Appeals for 1976 by the Final Judgment ($42,997.00). Essentially, the benefit to the City, and the loss to the plaintiff and its predecessors resulting from defendants' conduct from 1964 through 1980, is as follows:

Total paid by taxpayer—1964-1976		$1,286,486.90
Less refunds paid		
per Final Judgment	$353,728.00	-435,916.38
per Settlement	80,000.00	
Net paid by taxpayer		$852,758.90
Less amounts lawfully Assessed, as judicially determined		-714,823.34
Net amount, above lawful taxes, retained by City		$137,935.56
Plus title to property as valued in 1979 by		
City at	3,792,986.00	
Courts at	950,000.00	
Total benefit to City		$3,930,921.56 (maximum)
		1,087,935.56 (minimum)

58. On April 2, 1982, plaintiff herein commenced an action in the United States District Court, Northern District of New York (Civil Action No. 82 CV 319) against defendant herein and against certain individual defendants. The action referred to in this paragraph is hereinafter referred to as the "Federal Action."

59. The Federal Action set forth claims for relief identical to the claims set forth herein.

60. On May 6, 1983 judgment was entered in the Federal Action dismissing the Complaint. A copy of the Memorandum Decision and Order by the Hon. Howard G.

Munson upon which judgment was entered is attached hereto and made a part hereof as Exhibit "I".

61. By Notice of Appeal filed May 23, 1983, plaintiff appealed the judgment and Order referred to in Paragraph 59 hereof to the United States Court of Appeals for the Second Circuit.

62. By deed dated November 22, 1983 and recorded on November 30, 1983 at Liber 3053 of Deeds, page 217 in the Onondaga County Clerk's Office, the City attempted to convey title to the Property to defendant Foundation. This deed is hereinafter referred to as the "Foundation Deed."

63. The Foundation took title to the property upon actual or constructive notice of plaintiff's claims to title of the Property and the pendency of the Federal Action.

64. Any title conveyed by the City to the Foundation is subject to the rights of plaintiff herein.

65. By decision dated December 14, 1983, the Second Circuit Court of Appeals affirmed the judgment dismissing the Federal Action Complaint. A copy of the decision referred to in this Paragraph is attached hereto and made a part hereof as Exhibit "J".

66. The Federal Action against the City was dismissed solely on jurisdictional grounds and no judgment on the merits of the Federal Action as against the City was rendered.

67. By deed dated December 19, 1983, and recorded on February 23, 1984, at Liber 3073 of Deeds, page 17 in the Onondaga County Clerk's Office, the Foundation at-

tempted to convey title to the Property to defendant Amlea. This deed is hereinafter referred to as the "Amlea Deed."

68. Amlea took title to the Property upon actual or constructive notice of plaintiff's claims to title of the Property and the pendency of the Federal Action.

69. Any title conveyed to Amlea is subject to the rights of plaintiff herein.

70. Six months have not elapsed since the Second Circuit Court of Appeals affirmed dismissal of the Federal Action Complaint.

COUNT I

71. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 70, and 71 through 72, as though each were set forth in full herein.

72. Until April 9, 1979, the actions of the City precluded any fair use or return on the Property, virtually destroyed the value of the Property, and constitute a deprivation of plaintiff's Property without due process, without just compensation and without equal protection of the law all in violation of the Constitution of the United States and 42 U.S.C. §1983 and the Constitution of the State of New York.

COUNT II

73. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 70, as though each were set forth in full herein.

74. The taking of the Property by tax deed by the City, and the retention of the amounts received from the tax sale in excess of lawfully assessed taxes by the City, deprived plaintiff of its Property without due process, without just compensation and without equal protection of the law all in violation of the Constitution of the United States and 42 U.S.C. §1983 and the Constitution of the State of New York.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests that this Court grant judgment as follows:

A. Awarding the sum of $6,000,000.00 actual damages, plus interest, punitive damages in a like amount, and special damages in an amount to be determined by this Court as against the City;

B. Vacating the Tax Deed taken by the City, the Foundation Deed taken by the Foundation and the Amlea Deed taken by Amlea, and declaring plaintiff to be the full legal owner of the Property;

C. Directing the Clerk of Onondaga County to cancel and set aside the Tax Deed, the Foundation Deed; and the Amlea Deed;

D. Awarding plaintiff its costs and disbursements, including attorneys fees, of this action;

E. For such other further, additional and different relief as to this Court may seem just and proper.

Dated: February 28, 1984.

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